Supreme Court, U.S.
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No. 91-974

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ROBERT LEE HOLLAND,

Petitioner,

vs.

FIRST VIRGINIA BANKS, INC.
AND
DONALD BRENNAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

GERALD S. HARTMAN, ESQ.*
GREGORY W. HOMER, ESQ.
Attorneys for Respondent

Of Counsel:
ANDERSON KILL OLICK &
OSHINSKY
2000 PENNSYLVANIA AVENUE, N.W.
SUITE 7500
WASHINGTON, DC 20006
(202) 728-3100

*Counsel of Record

QUESTIONS PRESENTED

1. Whether the Civil Rights Act of 1991 should be applied retroactively by this Court to reopen a decision below which was demonstrably correct when issued.

2. Whether the Courts of Appeals have correctly interpreted this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), to bar claims of racially discriminatory discharge under the Civil Rights Act of 1866.

PARTIES TO THE PROCEEDING

The names of all of the parties appear in the caption. Respondent First Virginia Banks, Inc. has no parent company. All subsidiaries of First Virginia Banks, Inc. are wholly owned by that entity.

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BRIEF IN OPPOSITION

STATUTORY PROVISION INVOLVED

At the time the decision below was rendered, 42 U.S.C. §1981 read as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

COUNTERSTATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Petitioner Robert L. Holland commenced this action on January 18, 1990, by filing a complaint in the United States District Court of the Eastern District of Virginia. Mr. Holland named as defendants in the action the Respondents herein — First Virginia Banks, Inc. ("the Holding Company"), his former employer; and Donald D. Brennan, his former supervisor. In his original complaint, Mr. Holland alleged that he was subjected to racial harassment while employed by the Holding Company and that, because he complained about such harassment, his employment was terminated. Mr. Holland later amended his complaint to add the assertion that the Holding Company refused to reinstate him to employment because he had complained about the alleged harassment. Mr. Holland claimed that this conduct violated Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. ("Title VII"), the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("Section 1981"), and constituted intentional infliction of emotional distress under the laws of the Commonwealth of Virginia.

On February 26, 1990, the Holding Company and Mr. Brennan filed a motion to dismiss Mr. Holland's complaint in its entirety. In support of that motion, they argued, *inter alia*, that Mr. Holland's allegations failed to state a claim for relief under Section 1981 in light of this Court's pronouncements in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) ("*Patterson*"). The district court denied this motion by order dated March 30, 1990.

Trial in this matter commenced on July 10, 1990, before the Honorable Albert V. Bryan, Jr., with Mr. Holland's claims under Section 1981 and Virginia common law to be tried to the jury and his claims under Title VII to be adjudicated by Judge Bryan. On July 11, 1990,

at the close of plaintiff's evidence, defendants moved for a directed verdict. The Holding Company and Mr. Brennan again argued, *inter alia*, that any claims arising out of the alleged harassment of Mr. Holland and the Holding Company's alleged failure to continue Mr. Holland's employment were not actionable under Section 1981 because, as a matter of law, such conduct did not interfere with Mr. Holland's right as protected under Section 1981 "to make and enforce contracts."

Ruling from the bench, the district court agreed that Mr. Holland's claims under Section 1981 of unlawful harassment and termination from employment could not be submitted to the jury. However, the district court refused to enter judgment for defendants on all of Mr. Holland's Section 1981 claims on the grounds that "the jury can interpret that, if [Mr. Holland] has been fired, he wants his job back." The district court reasoned that "there is sufficient evidence to go to the jury on the 1981 [sic] on the claim that he was denied reinstatement, which would be a new contract."

On July 12, 1990, the jury returned a verdict in favor of the defendants on the state law infliction of emotional distress count and in favor of Mr. Holland on the Section 1981 count. The jury awarded Mr. Holland $20,000 in compensatory damages for emotional distress and $501,000 in punitive damages. On July 20, 1990, the district court entered findings of fact and conclusions of law in favor of Mr. Holland on his Title VII claim. The district court awarded Mr. Holland $100 in nominal damages for this claim, in addition to costs and attorneys' fees. By order dated September 7, 1990, the district court awarded Mr. Holland a total of $87,388.13 in costs and attorneys' fees.

The Holding Company and Mr. Brennan filed a timely post-trial motion under Rules 50(d) and 59 of the Federal Rules of Civil Procedure, requesting a judgment notwithstanding the verdict or, in the alternative, a new trial. The district court denied this motion in an order dated September 7, 1990.

The Holding Company and Mr. Brennan appealed the judgment of the district court on Mr. Holland's Section 1981 claim to the United States Court of Appeals for the Fourth Circuit. Mr. Holland did not appeal any aspect of the district court's judgment and, in particular, did not appeal the district court's ruling that Mr. Holland's termination claim could not be presented to the jury under Section 1981. On July 12, 1991, the Fourth Circuit reversed and vacated the district court's entry of judgment for Mr. Holland and his § 1981 claim, ruling that "the evidence is insufficient to permit a reasonable jury to find that the [Holding Company] refused to enter into a new employment contract with Holland." *Holland v. First Virginia Banks*, Inc., No. 90-2203 (unpublished slip. op. at 7.) (attached as Appendix A to the Petition for *Certiorari*).

By order dated, August 20, 1991, the Fourth Circuit denied Mr. Holland's motion for rehearing *en banc*. On November 22, 1991, Mr. Holland requested the Fourth Circuit to recall its mandate for the purposes of determining whether its prior decision should be altered in light of the enactment on November 21, 1991 of the Civil Rights Act of 1991. By Order dated December 17, 1991, the Fourth Circuit denied Mr. Holland's request without opinion. On December 16, 1991, Mr. Holland filed the instant petition for *certiorari* with this Court. The Holding Company and Mr. Brennan were served with the petition on December 18, 1991.

II. THE FACTS

Almost all of the evidence that Mr. Holland adduced at trial related to his claim that he was racially harassed. Specifically, Mr. Holland testified that during his employment with the Holding Company, Mr. Brennan and other employees of the Holding Company called him numerous names that he construed as racial epithets. Mr. Holland further testified that in approximately March 1989, he attempted to discuss the name-calling with Mr. Brennan in an effort to resolve the matter, and

that Mr. Brennan's response was that Mr. Holland was "too sensitive."

In mid-June of 1989, Mr. Holland went to see Shirley Beavers, a senior vice president of the Holding Company, to complain about the name-calling, as well as various other matters concerning his work assignments and sick leave. Mr. Beavers testified that this was the first occasion on which he became aware of Mr. Holland's problems at work.

Shortly thereafter, Mr. Holland had another meeting with Mr. Beavers, at which time Mr. Brennan was also present. At this meeting, Mr. Beavers stated to Mr. Holland that the name-calling would stop. Mr. Beavers testified that at that meeting, as well as on several other occasions, he instructed all individuals involved, including Mr. Brennan, that there should be no name-calling in the office. After Mr. Holland's initial meeting with Mr. Beavers, the name-calling stopped and did not resume.

On July 20, 1989, Mr. Holland was injured on the job and was unable to go to work. Mr. Holland testified that, on July 25, 1989, Mr. Brennan called him at home and told Mr. Holland that he had accepted Mr. Holland's resignation.[1] Mr. Holland responded that he had never resigned. Mr. Holland subsequently received a letter from Mr. Brennan that purported to "confirm our acceptance of your resignation of employment." The letter further stated that, while it was unnecessary for Mr. Holland to come to work through his termination date of August 11, 1989, Mr. Holland would be paid his normal pay rate through that date.

Mr. Holland responded to Mr. Brennan's letter with his own letter dated August 1, 1989, wherein Mr. Holland stated that he had "never submitted any letter of

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1. Mr. Brennan testified that, on July 10, 1989, Mr. Holland came into his office and informed Mr. Brennan that he was resigning. Mr. Brennan also testified that he and Mr. Holland subsequently agreed that Mr. Holland's last day of employment would be August 11, 1989. Mr. Holland denies that these conversations took place.

resignation nor given any verbal indication of resignation." The letter to Mr. Brennan also stated that "since a resignation has not been given to you, I refuse to accept your letter of acceptance." The letter concluded with the "request that I be given a thorough explanation of your intentions regarding my employment with 1st Virginia Bank."

By letter dated August 7, 1989, Mr. Beavers responded to Mr. Holland's August 1 letter to Mr. Brennan. In that letter, Mr. Beavers stated that "our position is that you resigned on July 10, 1989," and that "there was no misunderstanding regarding your intent to terminate your employment." The letter concluded that the Holding Company would "continue to pay you as if you were employed with us through August 11, 1989."

REASONS FOR DENYING THE WRIT

I. THE COURT SHOULD NOT GRANT REVIEW TO DETERMINE WHETHER THE CIVIL RIGHTS ACT OF 1991 SHOULD BE APPLIED RETROACTIVELY TO CASES THAT WERE DEMONSTRABLY CORRECT WHEN DECIDED.

Retroactivity of the Civil Rights Act of 1991 is the answer, Mr. Holland contends, to the "quirk of fate that has taken away [his] judgment." (Petition for *Certiorari* at 9-11) The unanimous view of the Courts of Appeals that Section 1981 does not cover termination claims after *Patterson* belies any notion that fate determined the outcome below. On the contrary, the decision below was eminently correct when made and the subsequent passage of the Civil Rights Act of 1991 cannot be deemed to render it incorrect unless this Court is prepared to reopen every Section 1981 case decided since *Patterson*.

Moreover, the question of the retroactivity of the Civil Rights Acts of 1991 should not be considered by this Court when no Court of Appeals has yet considered the issue, including the Court of Appeals from which

this petition arises. To date, several district courts have considered the issue of retroactivity of the Civil Rights Act of 1991. The better reasoned decisions hold that the statute should not be applied retroactively, while other decisions have reached the opposite conclusion. Presumably, these district court decisions will be reviewed by the Courts of Appeals. If a split develops at the Circuit level, this Court can consider at that time whether the issue needs to be resolved by this Court. Until such time, granting review on the issue would be premature.

The granting of *Certiorari*, followed by a remand order, should likewise not occur where this Court's prior decisions, if followed, would result in a decision here that the statute is not retroactive. Review by this Court need not occur where prior Supreme Court precedent provides clear guidance to the lower courts and the trend of the decisions is consistent with that guidance. As Justice Stevens has observed, "the Court seldom takes a case merely to reaffirm settled law." *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (dissent). That situation now exists on the issue of the retroactivity of the Civil Rights Act of 1991.

In a nutshell, the rationale given by those district court decisions holding that the Civil Rights Act of 1991 should not be applied retroactively is threefold: (1) retroactivity is not favored by the law, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988); (2) nothing in the Civil Rights Act of 1991 indicates that Congress intended the Act to apply retroactively — Section 402(a) states that "[e]xcept as otherwise specifically provided this Act and the amendments made by this Act shall take effect upon enactment"; and (3) the legislative history amply demonstrates that Congress intended that the Act not be applied to cases pending at the time of its enactment. *See, e.g., Van Meter v. Barr*, No. 91-0027 (D.D.C. Dec. 18, 1991).

The Act's legislative history, while not necessary to confirm its prospective application, demonstrates that

interpretation unmistakenly. Thus, the most "authoritative guide" to a statute's construction, the remarks of the sponsors (*North Haven Board of Education v. Bell*, 102 S. Ct. 1912, 1921 (1982)), establishes that the Civil Rights Act of 1991 applies prospectively only. The Interpretive Memorandum, setting forth the views of every one of the Act's co-sponsors (with the exception of Senator Kennedy), states unambiguously:

> The bill provides that, unless otherwise specified, the provisions of this legislation shall take effect upon enactment and shall not apply retroactively.

137 Cong. Rec. S15,485 (Oct. 30, 1991) (emphasis added).

In addition, the primary Republican sponsor, Senator Danforth, introduced the sponsors' Interpretive Memorandum with the following comments:

> My review of Supreme Court case law supports my reading that in the absence of an explicit provision to the contrary, no new legislation is applied retroactively. Rather, new statutes are to be given prospective application only, unless Congress explicitly directs otherwise, which we have not done in this instance. Support for this proposition is derived from Justice Scalia's concurring opinion in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 110 S.Ct. 1570, 1579 (1990), and the unanimous opinion of the Supreme Court in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988), and the numerous cases cited by Justice Kennedy in *Bowen*.
>
> I acknowledge that there appear to be two cases that do not adhere to this principle but instead support retroactive application of new statutes in the absence of "manifest injustice." *Bradley v. Richmond School Board*, 416 U.S. 696 (1974); *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969). The sponsors disapprove of these cases.

> Our intention in drafting the effective date provision was to adhere to the principle followed by the vast majority of Supreme Court cases and exemplified by *Bowen* and Justice Scalia's concurrence in *Bonjorno*.
>
> Subsection 22(b), regarding certain disparate impact cases, is intended only to provide additional assurance that the provisions of the bill will not be applied to certain cases that fit the provisions of that subsection. It should not be read in derogation of the sponsors' intention not to provide for retroactive effect or application as expressed in subsection 22(a) of the bill.

137 Cong. Rec. S15,483.

Only a single sponsor had a somewhat different view. Senator Kennedy stated that:

> It will be up to the courts to determine the extent to which the bill will apply to cases and claims that are pending on the date of enactment. Ordinarily, courts in such cases apply newly enacted remedies and procedures to pending cases.

137 Cong. Rec. 15,485 (Oct. 30. 1991).

Senator Kennedy's single statement, however, does not controvert the authoritative intent of the Act's sponsors. First, the remarks of a single Senator, even if he is a sponsor, do not bear much weight. *Consumer Product Safety Commission v. G.T.E. Sylvania, Inc.*, 100 S. Ct. 2051 (1980). Second, Senator Kennedy did not express any "intent" to apply the Act retroactively. His "intent" was for the courts to decide. 137 Cong. Rec. 15,485 (Oct. 30. 1991). Third, Senator Kennedy stated only that he understood the courts to apply "newly enacted remedies and procedures" to pending cases.

Moreover, the overwhelming weight of the remainder of the legislative statements corroborates the sponsors' intent that the Act not apply to pending cases. For example, Senators Dole, Burns, Cochran, Garn, Gorton,

Grassley, Hatch, Mack, McCain, McConnell, Murkowski, Simpson, Seymour and Thurmond, along with the Administration, submitted a separate Interpretive Memorandum that provides:

> Section 22 specifies that the Act and the amendments made by the Act take effect upon enactment. Accordingly, they will not apply to cases arising before the effective date of the Act. *See Bowen* [*supra*]; *Kaiser* [*supra*] (declining to resolve conflict between *Georgetown University Hospital and Bradley* [*supra*]).

137 Cong. Rec. S15,478 (Oct. 30, 1991).[2]

In the face of such overwhelming legislative history demonstrating the absence of any intent by the sponsors of the Civil Rights Act of 1991 that it apply retroactively, there exists no need whatsoever for this Court to grant *certiorari* or grant *certiorari* coupled with a remand order for consideration of the issue.

II. THE COURT SHOULD NOT GRANT REVIEW TO DECIDE WHETHER ITS OPINION IN *PATTERSON V. MCLEAN CREDIT UNION* PRECLUDES CLAIMS OF DISCRIMINATORY TERMINATION UNDER SECTION 1981.

Mr. Holland seeks review to determine whether the Courts of Appeals are incorrect in their unanimous view that *Patterson* bars claims of discriminatory discharge under Section 1981. Mr. Holland, however, did not preserve this issue on appeal and accordingly may not seek review here. Moreover, there is no conflict in the decisions of the Courts of Appeals on this issue or any other special and important reasons that would warrant granting review on this issue.

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2. See also the respective statements of Senators Gorton, Durenberger and Simpson (137 Cong. Rec. S15,966 (October 30, 1991)) and Representatives Hyde and LaFalce. (137 Cong. Rec. H9513, 9553 (Nov. 7, 1991)).

A. Petitioner Failed to Appeal the District Court's Ruling That His Termination Claim Could Not Be Pursued Under Section 1981.

As noted above, while the district court allowed Mr. Holland to attempt to convince the jury that there was a separate, racially motivated refusal to rehire him, the district court ruled that Mr. Holland could not pursue his Section 1981 claim that the Holding Company's decision to terminate his employment was discriminatory. Mr. Holland did not appeal this latter ruling by the district court. Indeed, Mr. Holland did not appeal at all from the district court's judgment. Instead, he elected solely to defend the district court's ruling that there was sufficient evidence to present a discriminatory refusal to rehire claim to the jury and the resulting verdict. As a consequence of Mr. Holland's decision, the Fourth Circuit was not asked to decide the purely legal question as to whether racially motivated discharges are actionable under Section 1981. Instead, the Fourth Circuit's consideration was limited to whether there was any evidence to support submitting a separate refusal to rehire claim to the jury under Section 1981.

This Court ordinarily does not decide questions not raised or involved in the lower court. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *United States v. Santana*, 427 U.S. 38, 41 n.2 (1976); *Duignan v. United States*, 274 U.S. 195, 200 (1927). For example, in *Delta Airlines* the petition for certiorari presented the issue of a district judge's abuse of discretion in denying the petitioner's costs under Rule 54 of the Federal Rules of Civil Procedure. The Court refused to review this issue. The Court held that the "question [of the district judge's abuse of discretion] was not raised in the Court of Appeals and is not properly before us." *Id.* at 362.

In *Duignan*, the petitioner sought, in part, to have the Court review the constitutionality of the forfeiture of his leasehold under Section 23 of Title II of the National Prohibition Act. The Court found that "[t]he court below

in enumerating the questions raised and presented made no mention of the constitutional question." *Id.* at 200. The Court also found that "[t]he assignment of errors below did not refer specifically to it as required by the rules of that court, and so far as the record discloses it was not presented there." *Id.* In denying *certiorari*, the Court reasoned that "[i]t is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Id.*

Accordingly, applying the long-standing principle of this Court not to review an issue that was not raised properly below, this Court should deny the petition for *certiorari* on the issue of whether racially motivated terminations are actionable under Section 1981 in light of the *Patterson* decision.

B. There is No Conflict In The Courts Of Appeals or Any Other Special and Important Reason For Granting Review on Mr. Holland's Termination Claim Under Section 1981.

Even if Mr. Holland had preserved the issue of whether discharge claims are actionable under Section 1981, that issue is not appropriate for review in this Court. The primary criterion for granting *certiorari* is the existence of conflicting decisions on an issue in the lower courts. *See* Supreme Court Rule 10.1(a). No such conflict exists as to the actionability of discharge claims under Section 1981. All eleven Circuits have considered that issue and all eleven have reached the same conclusion: in light of this Court's decision in *Patterson*, allegations of discriminatory discharge from employment do not state a claim under Section 1981.[3]

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3. *Taggart v. Jefferson Co. Child Support Enforcement Unit*, 935 F.2d 947 (8th Cir. 1991); *Gersman v. Group Health Ass'n Inc.*, 931 F.2d 1565 (D.C. Cir. 1991); *Trujillo v. Grand Junction Regional Center*, 928 F.2d 973, 976j (10th Cir. 1991); *Williams v. First Union Nat'l Bank*, 920 F.2d 232, 233-34 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2259 (1991); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255, 1256-58 (6th Cir. 1990), *cert. denied*, 111 S. Ct.

Indeed, this Court previously granted *certiorari* to review the sole appellate decision that had held to the contrary, *Hicks v. Brown Group, Inc.*, 902 F.2d 630 (8th Cir. 1990) ("*Hicks*"). Following the grant of review, this Court vacated the judgment that had been entered in *Hicks* on the Section 1981 discharge claim and remanded the case for further consideration in light of the Eighth Circuit's *en banc* opinion to be filed in *Taggart v. Jefferson County Child Support Enforcement Unit*, 915 F.2d 396 (1990), another case raising the issue of whether discharge claims are actionable under Section 1981. *Brown Group, Inc. v. Hicks*, 111 S. Ct. 1299 (1991).[4] In other words, this Court has already granted *certiorari* on the issue Mr. Holland raises here and has eliminated any conflict that existed in the lower courts.[5]

Fn. 3 (*Cont.*)

2889 (1991); *Thompkins v. DeKalb County Hosp. Auth.*, 916 F.2d 600, 601 (11th Cir. 1990); *Gonzalez v. Home Ins. Co.*, 909 F.2d 716, 722 (2d Cir. 1990); *McKnight v. General Motors Corp.*, 908 F.2d 104, 108-09 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1306 (1991); *Courtney v. Canyon Television & Appliance Rental, Inc.*, 899 F.2d 845, 849 (9th Cir. 1990); *Lavendar v. V & B Transmissions & Auto Repair*, 897 F.2d 805, 807-08 (5th Cir. 1990); *Hayes v. Community General Osteopathic Hospital*, 940 F.2d 55 (3d Cir. 1991).

4. The Eighth Circuit subsequently issued its *en banc* opinion, holding that Section 1981 does not cover discriminatory discharges. *Taggart*, 935 F.2d at 948 (8th Cir. 1991).

5. No other special or important reasons exist for granting review on this issue. To the extent that the Civil Rights Act of 1991 overrules *Patterson* and makes discriminatory discharges actionable under Section 1981, the issue that Mr. Holland seeks review on is not one that will arise in the lower courts in the future. While the issue may be of importance to Mr. Holland personally, it is not an issue that has any significant importance for the public generally and, accordingly, does not warrant review in this Court. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393 (1923).

CONCLUSION

Supreme Court review to determine whether the Civil Rights Act of 1991 should be applied to cases already decided is not warranted because there has been no consideration of that issue by the Court of Appeals in this case, nor by any other Court of Appeals. Further, it is a matter of settled law in this Court that statutory enactments such as the Civil Rights Act of 1991 will not be applied retroactively absent express Congressional intent. Congress did not express such an intent in the Civil Rights Act of 1991.

In addition, Supreme Court review to determine whether discriminatory discharges are actionable under Section 1981 is not warranted in this case because the issue was not preserved below. Moreover, the lower courts are unanimous in their view that this Court's decision in *Patterson* clearly precludes discharge claims under Section 1981.

Accordingly, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

GERALD S. HARTMAN, ESQ.*
GREGORY W. HOMER, ESQ.
Anderson Kill Olick &
Oshinsky
2000 Pennsylvania Ave. N.W.
Suite 7500
Washington, DC 20006
(202) 728-3100
Attorneys for Respondents

January 17, 1992

*Counsel of Record